IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-741

SAFEWAY TRAILS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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TABLE OF CITATIONS.

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Safeway Trails, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on September 18, 1979.

OPINIONS BELOW.

The original Decision and Order of the National Labor Relations Board (A1) is reported at 216 N. L. R. B. 951. The first opinion of the United States Court of Appeals for the District of Columbia Circuit (A52) is reported at 546 F. 2d 1038. The Supplemental Decision and Order of the Board on remand from the Court of Appeals (A58) is reported at 233 N. L. R. B. No. 171, 96 L. R. R. M. 1614. An Order Clarifying Supplemental Decision and Order was issued by the Board on March 31, 1978 (A80) and is reported at 233 N. L. R. B. No. 171A, 97 L. R. R. M. 1542. The second opinion of the Court of Appeals (A87) has not yet been officially reported, but is reported at 102 L. R. R. M. 2328.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 18, 1979.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. In light of the identical duty to bargain in good faith which is imposed upon both employers and unions by the National Labor Relations Act, are not an employer's non-coercive communications to its employees during negotiations entitled to the same protection as this Court accorded to comparable extra-bargaining conduct of a union in *NLRB v. Insurance Agents' International Union*, 361 U. S. 477 (1960)?

2. Does not the First Amendment right to free speech, which is implemented in the labor relations context by Section 8(c) of the National Labor Relations Act, preclude a finding that an employer's truthful, non-coercive communications to its employees during negotiations are, by themselves, violative of Section 8(a)(5)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech. . . ."

National Labor Relations Act:

Section 8(a)(5), 29 U. S. C. § 158(a)(5):

> "(a) It shall be an unfair labor practice for an employer-
>
> . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees. . . ."

Section 8(c), 29 U. S. C. § 158(c):

"(c) The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

Section 8(d), 29 U. S. C. § 158(d):

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

STATEMENT.

This petition presents the question whether, during negotiations for a new labor agreement, an employer has the same right that this Court accorded to unions in **NLRB v. Insurance Agents' International Union,** 361 U. S. 477 (1960), to engage in activity away from the bargaining table which is protected by the National Labor Relations Act ("NLRA"), where there is no evidence that such activity reflected a failure of the employer to conduct its at-the-table bargaining in good faith. The United States Court of Appeals for the District of Columbia Circuit refused to

apply the **Insurance Agents'** holding to the company involved here, choosing instead to follow dictum in a decision by the NLRB to the effect that non-coercive speech by the company away from the bargaining table, by itself, could be proof of a refusal to bargain in good faith.

Also at issue is whether the free speech protections of the First Amendment and Section 8(c) of the NLRA will permit inferences drawn from an employer's non-coercive statements to its employees, critical though they may be of the union's conduct of the negotiations, to serve as the sole basis for a finding that the employer's actual bargaining was in bad faith.

In this case the National Labor Relations Board ("Board") initially found that petitioner had committed no violation of its bargaining duty under Section 8(a)(5) of the NLRA when it made statements critical of the union's negotiator. The United States Court of Appeals for the District of Columbia Circuit vacated that decision. Contrary to the principles established by this Court in **Insurance Agents,** the Court of Appeals held that bad faith bargaining can be proved without any showing that the employer's conduct during the actual negotiations was inadequate or even suspect. On remand, the Board, on the basis of the identical record, reversed itself and found that petitioner had indeed violated Section 8(a)(5). The Court of Appeals affirmed *per curiam.*

The sole basis for the Board's ultimate finding was a series of non-coercive away-from-the-table communications from representatives of petitioner to bargaining unit employees. The Board did not consider any evidence of the actual bargaining in reversing its original finding that petitioner's bargaining had not been in bad faith. Rather, it inferred solely from the away-from-the-table communications that petitioner had no intention of reaching agreement with the chief negotiator for its drivers' union,

United Transportation Union, Local No. 1699 ("Union"). The Board held that bad faith could be found, despite the total lack of evidence that petitioner's extra-bargaining communications had any adverse impact on the negotiations or petitioner's participation therein.

This matter had its genesis in negotiations between petitioner and the Union which commenced in February, 1972, for an agreement to take effect upon expiration of the then-existing agreement on March 31, 1972. Petitioner had bargained with the Union or its predecessor for 35 years up to that time and there had been a series of contracts between them. However, agreement on a new contract was not reached, and the Union struck on April 2, 1972, having rejected petitioner's offer to extend the existing contract and to make any changes retroactive to April 1. Such extensions had been utilized in negotiations for previous contracts.

When the strike began, petitioner discontinued its operations. After notice to the Union and the striking employees, petitioner resumed limited operations approximately eight months later, in January, 1973. Nevertheless, negotiations continued on a regular basis from the date of the strike until the end of January, 1974, when they were broken off with the parties hopelessly deadlocked over basic economic issues. There had been 79 formal negotiating sessions up until that time, during which petitioner made numerous proposals and concessions. The strike continued until March, 1975, when it was abandoned by the Union.

The Union filed a charge with the Board on February 20, 1973, which was amended on March 30, 1973, to aver violations of Sections 8(a)(1)[1] and (5) of the NLRA based

1. No separate 8(a)(1) violations were found, and they played no part in this case in the Court of Appeals. *See* note 2 *infra*.

upon petitioner's alleged conduct both at and away from the bargaining table. The Regional Director declined to issue a complaint based on the 8(a)(5) allegations. The Union appealed to the General Counsel, who directed that a complaint should issue alleging that petitioner violated 8(a)(5) by its statements away from the table regarding John Lantz, the Union's chief negotiator.

Significantly, however, the General Counsel specifically excluded, as being without merit, the claim that petitioner's at-the-table conduct was unlawful. At a pre-hearing conference before the Administrative Law Judge ("ALJ"), counsel for all parties agreed that petitioner's conduct in the actual negotiations was not under attack and evidence thereof was not part of the General Counsel's case. This agreement was manifested by the exclusion of all evidence regarding events at the bargaining table and by the discussion in the ALJ's decision concerning the pre-hearing conference and the scope of the allegations against petitioner. (A7-A8)

On June 26, 1974 the ALJ issued his Decision and Recommended Order (A3) dismissing the complaint against petitioner in its entirety. On March 10, 1975, the Board adopted the findings and conclusions of the ALJ *in toto* and dismissed the complaint.

The Union sought review before the Court of Appeals which, on December 9, 1976, in an opinion by Wright, J. for a panel consisting of himself and Bazelon, C. J. and Robinson, J., vacated the Board's Decision and remanded the case for reconsideration. The Court of Appeals based its remand on two grounds. First, the court reversed the determination of the ALJ and the Board that the General Counsel had conceded at the pre-hearing conference that petitioner's conduct at the bargaining table was in good faith. (A53-A55) Second, the court determined that the ALJ and the Board had incorrectly required some evi-

dence of bad faith conduct by petitioner in the actual negotiations—evidence which was wholly lacking—in order to sustain an overall bad faith charge. The court held that, standing alone, an employer's away-from-the-table statements which are critical of the union's spokesman can be sufficient to demonstrate a lack of good faith, and rejected the notion that overall bad faith must be reflected in the employer's conduct at the bargaining table. (A56-A57)

Upon reconsideration, the Board, on December 9, 1977, issued a Supplemental Decision reversing its previous findings and concluding that petitioner had indeed violated Section 8(a)(5). Adopting the Court of Appeals' view of the governing decisional rule and relying solely upon petitioner's non-coercive statements and letters to its employees,[2] the Board found that petitioner had sought to undermine Lantz and had thereby refused to bargain in good faith. In so concluding, the Board relied on petitioner's statements to the effect that Lantz was preventing accord, and applied its own inference that petitioner was attempting thereby to destroy Lantz' credibility and to induce the employees to replace him.

On review, the Court of Appeals, on September 18, 1979, affirmed the Board's Supplemental Decision and clarifying order.[3]

2. The Board in its original decision reviewed each of the communications that were alleged in the complaint to have been coercive and in violation of Section 8(a)(1) of the NLRA. The Board concluded that each was non-coercive and was beyond reproach under 8(a)(1). (A2 n. 1, A32-A41) In its Supplemental Decision, the Board adopted its original rulings in this regard. (A67 n. 8, A71 n. 12)

3. An Order Clarifying Supplemental Decision and Order was issued by the Board on March 31, 1978, denying petitioner's request to toll the accrual of Board-ordered backpay for all periods preceding the Board's Supplemental Decision, in which petitioner for the first time was found to have violated Section 8(a)(5).

REASONS FOR ALLOWING THE WRIT.

The critical error committed by the Court of Appeals and the Board is that they have exalted a Board opinion's dictum, never followed heretofore, over the direct holding of this Court in **NLRB v. Insurance Agents' International Union,** 361 U. S. 477 (1960). In so doing, they have imposed restrictions upon the activities of employers engaged in collective bargaining which were explicitly rejected, with respect to similar union activities, both by this Court and by the Court of Appeals itself in **Insurance Agents.**[4]

The decisions below also overturn long-established principles recognizing and protecting an employer's right to communicate with its employees during negotiations with their bargaining representative. Heretofore, an employer was permitted to inform his employees of the status of negotiations, explain positions previously advanced by him to the union, and present his version of a breakdown in negotiations including criticism of the bargaining strategy and related tactics of the union leadership, without being held in violation of the NLRA. *See* **NLRB v. Movie Star, Inc.,** 361 F. 2d 346, 349 (5th Cir. 1966); **Procter & Gamble Manufacturing Co.,** 160 N. L. R. B. 334, 340 (1966). Indeed, Congress, in Section 8(c) of the NLRA, explicitly validated an employer's "expressing of any views, argument or opinion, or the dissemination thereof . . . if such expression contains no threat of reprisal or force or promise of benefit." Congress thereby forbade the Board from considering such expressions to constitute or be evidence of unfair labor practices. *See* **NLRB v. Gissel Packing Co.,** 395 U. S. 575, 617 (1969).

4. The decision of the Court of Appeals for the District of Columbia Circuit in **Insurance Agents** is reported at 260 F. 2d 736 (D. C. Cir. 1958).

Review and correction of the decisions herein by this Court is imperative, because they represent the resurrection of a view of the Board's role in the bargaining process that was rejected by this Court in **Insurance Agents.** In that case, the Board found that, solely by virtue of a series of away-from-the-table job actions, the union had demonstrated an intent inimical to good faith bargaining. The Board inferred from such harassment of the employer that the union could not have been negotiating in good faith. However, the Board there, as here, considered no evidence whatever of the union's actual conduct at the bargaining table in finding it to have violated Section 8(b)(3).[5] In affirming the refusal of the Court of Appeals for the District of Columbia Circuit to enforce the Board's order, this Court described the inquiry necessary to establish a breach of the bargaining duty. Under the Court's holding, a party's conduct away from the table has significance only insofar as it is reflected by, or reflects upon, deficient or questionable participation in the actual negotiations. Simply stated, where a party's extra-bargaining conduct does not constitute a *per se* violation of the duty to bargain (*e.g.*, unilateral changes in wages or benefits, or direct dealing with bargaining unit employees), such conduct, standing alone, will not sustain an inference or a finding of lack of good faith. 361 U. S. at 490. Certainly, the same rationale which this Court applied in evaluating conduct by a union in **Insurance Agents** should be applied to conduct by an employer which, as in this case, is directly comparable.

5. As this Court noted in **NLRB v. Katz,** 369 U. S. 736, 747 (1962), Section 8(b)(3) is the union counterpart of Section 8(a)(5) which, together with Section 8(d), imposes on employers the duty to bargain in good faith. Hence, the analysis of the bargaining duty set forth in **Insurance Agents** is equally applicable to the conduct required of employers. *See* **NLRB v. Cascade Employers Association, Inc.,** 296 F. 2d 42, 47-48 (9th Cir. 1961).

Although it had initially decided the instant case correctly, the Board, under the prodding of the Court of Appeals, repeated the error for which it was reversed twenty years ago in **Insurance Agents** and found a failure to bargain in good faith, based solely upon petitioner's communications to its employees. No consideration whatever was given to petitioner's performance at the bargaining table, or, for that matter, to that of the Union. Without even attempting to justify this approach in light of the decisional rules established in **Insurance Agents,** the Court of Appeals and the Board on remand seized upon dictum in the Board's decision in **General Electric Co.,** 150 N. L. R. B. 192 (1964), for their sole precedential support.

In **General Electric,** the Board considered the controversial approach to bargaining known as "Boulwareism," which combined a carefully researched employer bargaining proposal, characterized as "firm and fair" and presented to the union on a take-it-or-leave-it basis, with a massive public relations campaign aimed at the employees and the general public for the purpose of "selling" the proposal, much as a consumer product is sold. The communications campaign included criticism of the union and appeals to the employees to pressure the union into accepting the company's proposal. After finding a number of *per se* violations of 8(a)(5), the Board concluded that General Electric had not bargained in good faith based upon this two-pronged approach to the negotiations.

The **General Electric** decision was reviewed by the United States Court of Appeals for the Second Circuit. **NLRB v. General Electric Co.,** 418 F. 2d 736 (2d Cir. 1969), *cert. denied,* 397 U. S. 965 (1970). The court of appeals enforced the Board's order and, citing **Insurance Agents,** based its analysis specifically on this Court's direction to consider the totality of circumstances in evalu-

ating an alleged lack of good faith bargaining. *Id.* at 756. The court recognized that the Board's decision was based on the confluence of the company's at-the-table and away-from-the-table conduct, not solely on the latter, *id.*, and affirmed on the basis of that holding, *id.* at 762.

Clearly, the holding of the Board and the Second Circuit in **General Electric** is consistent with the teaching of this Court in **Insurance Agents,** since the totality of the company's conduct, both at and away-from-the-table, was considered and served as the basis for the finding of overall bad faith bargaining. However, the Board's dictum in **General Electric,** upon which the decisions below in the instant case relied, just as clearly is not consistent with **Insurance Agents.** This dictum suggests that statements by an employer to its employees that are critical of the union can, standing alone, warrant the conclusion that the employer is not bargaining with the union in good faith. **General Electric,** *supra,* 150 NLRB at 194-95. (A90-A91)

But, in **Insurance Agents,** this Court held that union conduct which is potentially far more disruptive of the bargaining process, i.e. sudden, unpredictable job actions, could not, without reference to the actual bargaining, support such a finding.[6] This Court said:

6. In its Supplemental Decision in the instant case, the Board recognized the absence of evidence regarding the bargaining and acknowledged the difficulty posed by such a record for determining a party's good faith. The Board stated: "In most cases, the Board can more accurately evaluate a party's conduct by examining the conduct at the table in light of the conduct away from the table, and vice versa." (A60)

Compounding its error in nevertheless proceeding with its evaluation of petitioner's overall conduct on an abbreviated record, the Board drastically reduced the burden of proof on the General Counsel. Under prior Board decisions, he was required to show affirmatively that petitioner's conduct at the table was at least ambiguous, in order to give weight to the away-from-the-table communications. **Baldwin County Electric Membership Corp.,** 145 N. L. R. B. 1316, 1318 (1964); **Milbin Printing, Inc.,** 218 N. L. R. B.

> "The scope of § 8(b)(3) and the limitations on Board power which were the design of § 8(d) are exceeded, we hold, by inferring a lack of good faith not from any deficiencies of the union's preformance at the bargaining table by reason of its attempted use of economic pressure, but solely and simply because tactics designed to exert economic pressure were employed during the course of the good-faith negotiations."

361 U. S. at 490.[7] There simply must be bargaining-table actions which will support an inference of bad faith.

Aside from the total disregard manifested in the decisions below of this Court's teaching in **Insurance Agents**—that the conduct in the actual negotiations must be the focal point of an overall bad faith claim—the decisions below are even more insidious when one considers the type of conduct on which petitioner's bad faith 8(a)(5) violation was deemed to be founded. As noted, such con-

6. (Cont'd.)
223, 224 (1975), *rev'd on other issues,* 538 F. 2d 496 (2d Cir. 1976). Here, rather than according petitioner a presumption that its conduct at negotiations had been in good faith, as it should have in the absence of evidence to the contrary, the Board treated the negotiations as a "neutral factor, favoring neither sustaining nor dismissing the allegations of the complaint." (A60) This, we submit, is patently improper and violates petitioner's right to due process.

7. In his separate opinion in **Insurance Agents** Justice Frankfurter stated, 361 U. S. at 503:

> "From the respondent's conduct the Board drew the inference that respondent's state of mind was inimical to reaching an agreement, and that inference alone supported its conclusion of a refusal to bargain. The Board's position in this Court proceeded in terms of the relation of conduct such as respondent's to the kind of bargaining required by the statute, without regard to the bearing of such conduct on the proof of good faith revealed by the actual bargaining."

Justice Frankfurter said as to this: "I agree that the position taken by the Board here is not tenable." *Id.* at 504. *See also* footnote 5 of the majority opinion. *Id.* at 482-483.

duct consisted solely of non-coercive communications to employees regarding contract negotiations, communications which the Board has repeatedly sanctioned as being protected by Section 8(c) and the First Amendment. *See, e.g.*, **Stokely-Van Camp, Inc.**, 186 N. L. R. B. 440, 449-50 (1970); **Wantagh Auto Sales, Inc.**, 177 N. L. R. B. 150, 154 (1969); **Procter & Gamble Manufacturing Co.**, *supra*.[8]

In none of petitioner's communications was there even the hint of coercion, *i.e.*, a promise of benefit or threat of harm. Each represented nothing more than an expression of petitioner's view of the negotiations and its view of the reason for the stalemate. More importantly, as far as the Board knew, without examining the negotiations, everything said by petitioner about Lantz and his blame for the impasse and lack of an agreement was absolutely accurate. How, then, can petitioner be held to have bargained in bad faith when, in truthful, non-coercive terms, it advised its

8. Merely reciting the five statements upon which the Board and Court of Appeals placed principal reliance demonstrates the alarming portent of their decisions.

The first was a letter to the drivers transmitting a contract proposal previously submitted to the Union but rejected by it. The supposedly opprobrious comment in the letter was that "the time for action . . . is past due" and that each employee should "act in the interest of [his] own personal welfare and aid in getting an early settlement." (A65, A66; A91) The second was contained in a letter to a number of senior drivers and noted how puzzling it was for long-term employees to have permitted a seven-year employee, Lantz, to take over. The letter asked the drivers to give the contract offer "serious consideration and then let Lantz know how you feel as a body of men." (A67; A91-A92) The third was an off-the-cuff remark by petitioner's president to the wife of a striking driver in response to her questioning. The president stated his belief that the dispute could be settled with any drivers other than Lantz. (A67-A68; A92) The fourth was a remark made by the president to a senior driver to the effect that he could not understand why the older men could not do something to get the strike settled. (A68; A92) The last was a comment on the picket line to several employees by petitioner's vice president to the effect that he felt that the strikers were following the wrong man. (A68; A92)

employees of its perception of the cause of the strike and bargaining stalemate and virtually pleaded with them to talk with their bargaining representative about it?

If the First Amendment and Section 8(c) do not protect such remarks, something is profoundly wrong. Clearly, however, they do offer such protection. As the Court of Appeals for the Second Circuit observed in **NLRB v. General Electric Co.**, *supra*, 418 F. 2d at 756: "In circumstances such as these, the interest in free speech and informed choice must prevail over the slight possibility that the representatives' positions might be undermined. . . ." In order to insure proper administration of the NLRA and proper Board oversight of the collective bargaining process, and to safeguard the integrity of the free speech guarantees of the First Amendment and Section 8(c), this Court must review and correct the patently misconceived decisions below.

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should issue to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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